JD–81-05
Cleveland, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CLEVELAND CINEMAS MANAGEMENT
COMPANY, LTD.

and Case 8-CA-34971-1

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES
OF THE UNITED STATES AND
CANADA, LOCAL 160

CLEVELAND CINEMAS MANAGEMENT
COMPANY, LTD.
CLEVELAND CINEMAS, LLC,
SHAKER SQUARE CINEMAS LLC,
AND CEDAR-LEE THEATRE COMPANY,
SINGLE EMPLOYER

and Case 8-CA-35072-1

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES OF
THE UNITED STATES AND CANADA
LOCAL NO. 160

Alan Binstock, Esq.
for the General Counsel.
Stephen A. Markus and
Fred Seleman, Esqs.
(Ulmer and Berne),
of Cleveland, OH,
for the Respondent.
John A. Galinac, Business Agent,
of Cleveland, OH,
for the Charging Party.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge: On April 8, 2004, IATSE Local 160, Union herein, filed a charge against Cleveland Cinemas Management Company, LTD (Respondent herein), in Case 8-CA-34971-1.

On September 30, 2004 the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint alleging that Respondent violated Section 8(a)(1) and (3) of the

National Labor Relations Act, the Act herein, when in March 2004 it refused to consider for employment and/or refused to hire Michael Yeagar, Thomas Draper, and James Marcinek.

Respondent filed an Answer in which it denied that it violated the Act in any way.

On May 26, 2004, June 9, 2004, and September 16, 2004, the Union filed a charge, a first amended charge, and a second amended charge, respectively, in Case 8-CA-35072-1 against Respondent and three other entities, i.e., Cleveland Cinemas, LLC, Shaker Square Cinemas, LLC, and Cedar-Lee Theatre Company.

On October 14, 2004 the National Labor Relations Board, by the Regional Director for Region 8 issued a complaint alleging that the four entities listed above are a single employer and that the entities, collectively referred to as Respondent, violated Section 8(a) (1) and (5) of the Act when on June 1, 2004 after reaching a lawful impasse in contract negotiations, it unlawfully failed to implement that portion of its final contract offer that afforded service technician work to the unit represented by the Union.

Respondent filed an answer in which it denied it violated the Act in any way.

On October 14, 2004 the National Labor Relations Board, by the Regional Director for Region 8, ordered that these two cases be consolidated for trial.

A hearing was held before me on June 6, 7, and 8, 2005 in Cleveland, Ohio.

Based on the entire record to include post hearing briefs submitted by Counsel for the General Counsel and Counsel for Respondent and considering the testimony of the witnesses and their demeanor, I hereby make the following

I. Findings of Fact

Respondent, Cleveland Cinema Management Company, LTD is an Ohio limited liability company with an office and place of business in Solon, Ohio, where it has been engaged in the operation of movie theaters in the Cleveland, Ohio area. By contract with Dolan Cinemas, LLC and 422 Company LTD, Respondent assumed management of the Chagrin Cinemas, a fourteen screen movie theater, on April 9, 2004.

The unfair labor practices alleged in Case 8-CA-34971-1 involve the Chagrin Theater.

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The unfair labor practice allegations in Case 8-CA-35072-1 involve four entities, i.e., Cleveland Cinemas Management Company., LTD, which operates movie theaters in the Cleveland, Ohio, area, Cleveland Cinemas, LLC, that owns and operates the Tower City Movie Theater – an eleven screen theater - in Cleveland, Ohio, the Cedar-Lee Theater Company which owns and operates the Cedar-Lee Theater – a six screen theater – located in Cleveland Heights, Ohio, and Shaker Square Cinemas LLC which owns and operates the Shaker Square Cinema Movie Theater – a six screen movie theater-located in Cleveland, Ohio.

For purposes of this litigation only Respondent admits that the four entities listed above constitute a single employer. Respondent further admits, and I find, that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Section 8(a) (1) and (5) allegations in Case 8-CA-35072-1 involve negotiations between Respondent and the Union regarding the three movie theaters mentioned above, i.e., Tower City, Shaker Square, and Cedar Lee.

II. The Labor Organization Involved

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Case 8-CA-34971-1

As background for both this case and Case 8-CA-35072-1 it should be noted that technology has rather dramatically changed the job of movie projectionist. The testimony and documents in this case demonstrate that being a projectionist is not as complex a job as it once was. Because of technology theater managers can also run several movie projectors at the same time. Fewer and fewer people running movie projectors can run film on more and more screens than in the past. I don't believe any party to this litigation would disagree with this.

In Case 8-CA-34971-1 it is alleged that Respondent violated Section 8(a) (1) and (3) of the Act when it failed to consider for employment and/or refused to hire Michael Yeagar, Thomas Draper, and James Marcinek.

Larry Dolan owns the Chagrin Theater which is a 14 screen movie theater in Solon, Ohio. He contracted with Megastar to operate the theater for him. Later he contracted with Respondent to replace Megastar as the operator of the theater. Respondent was due to take over operation of the theater on April 9, 2004.

When Megastar managed the Chagrin theater there were three classifications of workers in the theater – managers, projectionists and floor staff.

Megastar employed three managers, i.e., a general manager, a house manager, and an assistant manager. It also employed three projectionists – two full time projectionists, Michael Yeager and Thomas Draper, who worked 35 to 40 hours per week and a part-time or swing projectionist James Marcinek who worked about nine hours per week.

Megastar also employed floor staff. Floor staff consisted of ushers, people who worked in the concessions, ticket takers, etc.

Only the projectionists were represented by a Union. In this case IATSE Local 160.

It is uncontested and <u>not</u> alleged as an unfair labor practice that Respondent, when it took over the theater on April 9, 2004, wanted to have the three managers, who were to be statutory supervisors within the meaning of Section 2(11) of the Act, do the projectionist's work and the six jobs, i.e., three managers and three projectionists would be reduced to three managers who would do the projectionist work.

Respondent, in the person of owner Jon Foreman and director of operations Ken Young, hired the three managers who worked for Megastar as managers. Tim Monde was kept on as General Manager, Brian Dunigan was kept on as House Manager, and David Smith was kept on

as Assistant or Relief Manager. Prior to Respondent taking over the Chagrin theater on April 9, 2004, the three managers interviewed and hired the floor staff.

Respondent's owner and founder Jon Foreman testified that the three managers were kept on because he understood that they were doing a satisfactory job. There is no evidence in the record to refute this. For example, no one from Megastar, no representative of owner Larry Dolan or Larry Dolan himself or any employee at the Chagrin theater claimed that the three managers who were kept on or any one of them were doing a bad job.

Since Respondent was hiring statutory supervisors to do manager and projectionist duties and not promoting its employees to management positions it was not unlawful for it to discriminate in hiring based on union affiliation. If, on the other hand, Respondent hired all the employees in the theater and was deciding who to promote to management from within the ranks of its own employees then it could not discriminate based on union affiliation in deciding which of its employees to promote to management. Yeager, Draper, and Marcinek, however, were not employees of Respondent when it decided to hire the Megastar managers to be its statutory supervisors and to run the projection equipment.

It should be noted that only Michael Yeager ever submitted an application. Neither Draper nor Marcinek did. Monde, Dunnigan and Smith, all of whom were hired, did submit applications.

It appears Respondent was a successor to Megastar, i.e., running the same business, in the same location with the same equipment and with a majority of the same people employed by Megastar. But because the statutory supervisors were chosen not from the ranks of Respondent's employees but from the outside I must conclude as a matter of law that the Act was not violated in Case 8-CA-34971-1. See, *Pacific American Shipowners Association*, 98 NLRB 582, 597-598 (1952).[1]

It could well be that the union represented projectionists would have made better "manager/projectionists" than those hired but that it is not the test. Yeager and Draper also testified that it seemed like Respondent really didn't want them and that well may be the case but there was still no violation of the Act.

The record, I note, is devoid of evidence that after Yeager, Draper and Marcinek left the Chagrin theater that the theater fell apart in terms of films not being shown properly and on time.

B. Case 8-CA-35072-1

As noted in the first part of Section IIIA, above, the occupation of movie projectionist has been reduced in complexity by technology.

It is not alleged that Respondent violated the Act by eliminating so-called dedicated projectionist positions and assigning projectionist work to managers who were statutory supervisors.

[1] I resist General Counsel's suggestion that I not follow this case. The General Counsel may want to argue the merits of reversing this case to the Board through the Exceptions procedure.

Respondent advised the Union that it wished to eliminate the dedicated projectionists' positions at three separate theaters and have that projection work done by managers who would be statutory supervisors. Respondent recognized the obligation it had to bargain over the effects of this decision on the bargaining unit employees.

The three movie theaters were the Tower City Theater with eleven screens, the Shaker Square Theater with six screens, and the Cedar-Lee Theater with six screens.

The parties met three times, May 12, 2004, May 17, 2004, and May 25, 2004. Each time they met a federal mediator from the Federal Mediation and Conciliation Service (FMCS) was present.

Respondent was represented at the negotiations by Jon Foreman and attorney Stephen Markus. The Union was represented by business agent John Galinac and Local 160 President William Taggart.

The separate collective bargaining agreements at each of the three theaters had expired. At Tower City it had expired on April 30, 2000 and at the Cedar-Lee and Shaker Square theaters it expired on December 31, 2002. The negotiations in May 2004 involved all three theaters.

It is conceded by the parties to this litigation that a lawful impasse in negotiations had been reached.

When lawful impasse is reached the employer is allowed to make unilateral changes in working conditions. Even after impasse, such changes must "not [be] substantially different or greater than any [offers] which the employer . . . proposed during the negotiations." *Atlas Tack Corp.*, 226 NLRB 222, 227 (1976), enforced, 559 F.2d 1201 (1st Cir. 1977). Often times it is said that the employer can implement its last best offer to the Union.

Although Respondent started out negotiations with the Union with the intent that it be limited to effects bargaining over the decision to eliminate the dedicated projectionist positions and have statutory supervisors run the projection equipment Respondent modified its position and requested the Union to accept a service technician agreement, which the Union had agreed to with another movie theater chain, in lieu of having dedicated projectionists at the theaters. The Union wanted both dedicated projectionists positions and a service technician agreement. Respondent's position was a "quid pro quo," i.e., the Union gives up on the projectionists positions and represents a unit of service technicians which would consist of 40 hours of work per week for two service technicians to cover all three theaters. See, *Plainville Ready Mix,* 309 NLRB 581 (1992), enforced, 44 F.3d 1320 (6th Cir. 1995). I agree with the General Counsel that this case controls in this situation.

Respondent put its proposal regarding the service technician agreement in writing and presented it to the Union on May 17, 2004. See General Counsel Exhibit 18. A copy of Respondent's proposed service technician agreement is attached to this decision as Appendix A.

On June 1, 2004 Respondent partially implemented its last best offer, i.e., it eliminated the dedicated projectionist positions and had that work done by statutory supervisors, but it did not implement the service technicians agreement which was Respondent's very own proposal.

I find that Respondent violated Section 8(a) (1) and (5) of the Act when it failed to implement its proposal regarding the service technician agreement.

Respondent objects and claims that the service technician agreement would be an unlawful pre-hire agreement, but it is not at all clear who the service technicians would be if the service technician agreement had been implemented. It is quite possible that the service technicians would be some of the same union represented projectionists who worked at the three theaters.

Again, the service technician agreement was the proposal of Respondent and not the Union. Having proposed it and now saying it would be illegal would be similar to a person about to be sentenced for killing his or her parents throwing himself or herself on the mercy of the Court because he or she is an orphan.

Respondent also argued that the Union did not want the service technician agreement, but the Union didn't want it in lieu of representing the traditional unit of projectionists. It is inconceivable that the Union should prefer to represent no one at the three theaters rather than a unit of two service technicians.

Remedy

The remedy for this violation should include a cease and desist order, the posting of a notice, and a requirement that Respondent recognize and bargain in good faith with the Union and implement the service technician agreement which is attached to this decision as Appendix A.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act when it failed and refused to implement the Service Technician Agreement after reaching lawful impasse in negotiations with the Union.

4. The above violation of the Act is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record I issue the following recommended[2]

ORDER

Respondent, Cleveland Cinemas Management Company, LTD, Cleveland Cinemas, LLC, Shaker Square Cinemas LLC, and Cedar-Lee Theater Company, a single employer for purposes of this litigation, shall:

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Unlawfully failing and refusing to implement the Service Technician Agreement after reaching lawful impasse in negotiations with the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request implement the Service Technician Agreement which is attached to this Decision as Appendix A.

(b) Recognize and bargain in good faith with the Union regarding the unit described in Article I of the Service Technician Agreement (Appendix A).

(c) Within 14 days after service by the Region, post at the Tower City Theater, Shaker Square Theater and Cedar-Lee Theater where notices customarily are posted, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 8 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees at the three theaters customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that Respondent has gone out of business or closed one or more of the theaters involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed at the closed theaters at any time since May 1, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 10, 2005.

Martin J. Linsky
Administrative Law Judge

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX B

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unlawfully fail and refuse to implement the Service Technician Agreement after reaching lawful impasse in negotiations with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal Law.

WE WILL recognize and bargain in good faith with the Union and implement the Service Technology Agreement we proposed during negotiations with the Union.

CLEVELAND CINEMAS MANAGEMENT
COMPANY, LTD.
CLEVELAND CINEMAS, LLC,
SHAKER SQUARE CINEMAS LLC,
AND CEDAR-LEE THEATRE COMPANY,
SINGLE EMPLOYER

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1240 East 9th Street, Federal Building, Room 1695
Cleveland, Ohio 44199-2086
Hours: 8:15 a.m. to 4:45 p.m.
216-522-3716.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 216-522-3723.